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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-69

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO)'S BRIEF IN OPPOSITION

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August 11, 1982

QUESTION PRESENTED

Whether a complaint filed pursuant to Section 1 of the Sherman Act was properly dismissed when it alleged that in the course of a labor dispute an agreement was negotiated concerning wages between the union, a contractor and the contractor's customer, in which the union agreed that its member employees would cease picketing, and return to the contractor's customer's jobsite and the contractor's customer agreed to pay monies into an escrow account pending the outcome of collective bargaining when the courts below found that the complaint alleged no conspiracy apart from that agreement.

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WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

Defendant, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, (AFL-CIO), respectfully prays that this Court deny a writ of certiorari seeking review of the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 13, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, 675 F.2d 881, appears in Appendix A of the Petition. The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported and appears in Appendix B of the Petition.

JURISDICTION

The United Brotherhood of Carpenters and Joiners of America, (AFL-CIO) adopts the statement of jurisdiction of the Petition.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act (15 U.S.C., §1 et seq.), and the Clayton Act (15 U.S.C. §12 et seq.) are set forth in the Petitioners' Appendix D and Supplemental Appendix A, hereto.

STATEMENT OF FACTS

1.

Jurisdiction in the Court of First Instance

The jurisdiction of the District Court was invoked under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

2.

The Facts

The Respondent, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, (AFL-CIO), believe that the Statement of the Case as presented in the Petition is incomplete and, as a result may be misleading. For that reason the following brief additional statement is submitted.

The Petitioners are three trade associations ("the Trade Associations") and two private contractors ("the Contractors"). The Defendants are the Will County Carpenters District Council (the "Union"), Commonwealth Edison ("Edison"), the Gust K. Newberg Construction Company ("Newberg") and the United Brotherhood of Carpenters and Joiners of America, (AFL-CIO). The action stems from a labor dispute in Will County during the summer of 1979. (App. C, pp. 34a - 36a).

The Trade Associations represented some of the construction contractors in Will County and had in the past negotiated a series of collective bargaining agreements with the Union. The agreements between the Union and these Trade Associations have for a number of years been the model for agreements between the Union and other contractors who do not belong to the Trade Associations. In 1979, however, the Trade Associations and the Union could not agree on contract terms prior to the termination of the existing contract. Soon after the contract expired, the Union directed its members to engage in selective picketing and strikes against certain contractor members of the Trade Associations. The Trade Associations responded to this action by directing all their members to engage in a defensive lockout of the Union. (App. C, pp. 39a - 40a).

Newberg had contracted with Commonwealth Edison to perform construction work at sites located in Braidwood and Romeoville, Illinois. ("Commonwealth Projects"). (App. C, p. 41a). Two (2) other contractors, Morrison Construction Company ("Morrison") and Getschow Construction Company ("Getschow"), neither of which was named as a Defendant, were also engaged in performing construction work at the Commonwealth Projects. These projects were subject to strikes and lockouts commencing during July, 1979.

Edison moved to prevent a work stoppage on the projects by entering into an agreement with the Union whereby Edison would pay into an escrow account $2.25 per employee for each hour worked during the strike by employees of Newberg and Edison's other contractors. (App. C, p. 42a). The Contractors were to pay their carpenter employees for their work at the wage rate prevailing as of the prior collective bargaining agreement. The additional amount deposited in the escrow account was to be released in accordance with any collective bargaining agreement negotiated by the Union and the Trade Associations. Thus, if the agreement ultimately reached between the Union and the Trade

Associations called for a lesser amount of wage increase, that amount would be paid out of the escrow fund and the remainder would be returned.

At the time these events occurred, Newberg employed approximately twenty-five percent of the Will County Union carpenters on its Edison Projects, and these workers returned to work after the escrow agreement was reached. Approximately four weeks later, on August 20, the Trade Associations and the Union agreed to a $2.25 per hour minimum wage increase retroactive to June 1, 1979. (App. C, p. 43a).

One of the Trade Associations first filed a charge with the National Labor Relations Board alleging that the Union had failed to bargain in good faith. This charge was rejected by the Board. The Board refused to issue a complaint. Letter from Alex V. Barbour, Regional Director, to Charles E. Murphy (Sept. 6, 1979) (Re: Carpenters District Council of Will County and Vicinity (Mid-America Regional Bargaining Association) Case 13-CB-8611).

Subsequently, the Petitioners filed their complaint in the instant case.

3.

The Decision of the District Court

The District Court granted the Defendants' motion to dismiss the complaint on February 11, 1981.

The court found that the only direct restraint alleged in the complaint was a restraint in the market for human labor. Such a restraint, the court found, is exempt from antitrust scrutiny under the "labor exemption" created by §§6 and 20 of the Clayton Act, 15 U.S.C. §17 and 29 U.S.C. §52 and §§4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§104, 105 and 113. The court ruled, therefore, that the complaint failed to state a claim upon which relief could be granted. (App. B, p. 30a).

4.

The Decision of the Court of Appeals

The Court of Appeals unanimously affirmed the District Court's decision holding that the Petitioners failed to plead adequate allegations of conspiracy to remove this case from both the statutory and non-statutory labor exemptions. The Court concluded therefore, that the Respondents' activities were immune from anti-trust liability. (App. A pp. 24a - 25a). With respect to the statutory exemption, the Court initially quoted the Clayton Act; "The labor of a human being is not a commodity or article of commerce." Section 6 of the Clayton Act, 15 U.S.C. §17. The Court of Appeals held that the statutory exemption applied to collective bargaining agreements, and that the escrow agreement was "similar to a traditional collective bargaining agreement". (App. A, p. 11a, n. 14). Therefore, the Court of Appeals concluded that since collective bargaining was involved, the statutory labor antitrust exemption applied. (App. A, pp. 12a, n. 15, 14a). With respect to the non-statutory exemption, the Court of Appeals concluded that the Petitioners' well pleaded facts failed to demonstrate a concerted anti-competitive purpose. There was no single shared purpose, each party had its own separate and distinct purpose. Furthermore, the only anti-competitive purpose alleged was possessed by Newberg. Yet the complaint failed to plead even this interest properly, for it alleged that Edison agreed to "pressure" its contractors into signing the escrow agreement with the Union (App. C, p. 42a). Thus, the complaint alleged that the only party who might reap an anti-competitive benefit from the agreement did not in fact seek that result, but was forced into acting by a non-labor entity lacking anti-competitive intent. (App. A p. 17a).

REASONS FOR DENYING THE WRIT

1.

The Decision below does not conflict with decisions of this Court nor does it impermissibly expand the scope of the labor exemptions to antitrust laws.

In its Petition, the Petitioners assert that the escrow agreement is not exempt from the antitrust laws. The Petitioners fail to demonstrate how the lower court's determination that the escrow agreement, insofar as wages are concerned, is contrary to any of the decisions discussed in the Petition.

The Petitioners incorrectly assert that the statutory exemption is applicable only to unilateral union activity and can only be asserted by unions. *Snyder Company* v. *ASC*, 677 F.2d 1111, 1118, n. 10 (6th Cir. 1982) is cited not for its substance or its ultimate decision, but for a footnote that is dicta and as quoted in the Petition is misleading. The full quote states:

> The "statutory" exemption was created by congress in sections 6 and 20 of the Clayton Act, 15 U.S.C. §§17 and 29 U.S.C. §52, and in the Norris-LaGuardia Act, 29 U.S.C. §§101 et seq. This exemption can only be asserted by a labor organization itself and will be lost if the union combines or conspires with a non-union group to restrain trade. See, e.g., Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797, 16 LRRM 798 (1945). The "non-statutory" exemption was created by the Supreme Court to exempt agreements between unions and employers. These agreements are not exempt under the statutory exemption because the unions are not acting unilaterally, but the court has concluded that they should be exempt nevertheless as "a proper accommodation between congressional policy favoring collective bargaining. Under the NLRA and the congressional policy favoring free competition in business markets." Connell v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 622, 89 LRRM 2401 (1975). Because Defendants in the present case

> are not labor organizations, they cannot assert the statutory exemption. *Employers, however, as well as labor unions, have successfully raised the nonstatutory exemption for provisions arising from collective bargaining agreements.* See McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979). See; Mackey v. National Football League, 543 F.2d 606, 612 (8th Cir. 1976), cert. dism'd, 434 U.S. 801 (1977). (Emphasis added)

The Court of Appeals also dismissed the argument that only unions can assert the statutory exemption by concluding with substantial support that:

> Although both the statutory and the non-statutory exemptions are generally phrased as exemptions for union behavior, logic dictates that they be applied to all parties when an agreement with a union forms the basis of a complaint. The exemption would serve little purpose in furthering national labor policy if employers risked liability under the antitrust laws for entering into collective bargaining agreements. Other circuits have concurred in this judgment . . . Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n.14 (3rd Cir. 1974). *See also*, Amalgamated Meat Cutters & Butchers Local 576 v. Wetterau Foods, Inc., 574 F.2d 133, 136 (8th Cir. 1974); Mackey v. NFL, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). (App. A p. 19a n. 22).

The Petitioners in their argument, assume that sufficient facts were pleaded to create a conspiracy with a non-union group to restrain trade. However the Court of Appeals held that the Petitioners "failed to properly plead such conspiracy." (App. A, pp. 17a - 18a).

The Petitioners assert that the lower court's decision is in conflict with *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797 (1945). This is simply not accurate. *Allen Bradley* involved more than an agreement between a union and a group of non-labor entities concerning wages. In *Allen Bradley* there was a

combination consisting of contractors, manufacturers and a union which had the effect of freezing out competitors and resulted in the establishment of an anticompetitive price. The combination was created with the obvious intent of effectively driving those contractors who were not parties to it out of business in the New York area.

In those instances where the alleged conspiracy was based solely upon a collective bargaining agreement which concerned mandatory subjects of bargaining, courts have generally held that the statutory exemption from the antitrust law is applicable. Thus, the Court of Appeals' decision is not in conflict with the following cases which were cited in the Petition but not shown to be in conflict with the Court of Appeals' decision in the instant case. *Connell Construction Co.* v. *Plumbers and Steamfitters Local 100*, 421 U.S. 616 reh. denied, 423 U.S. 884 (1975); *see also*, e.g., *California State Council of Carpenters* v. *Associated General Contractors of California, Inc.*, 648 F.2d 527 (9th Cir. 1980), cert. granted, U.S. , 102 S. Ct. 998 (1982); *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

Nor are the cases cited in the Petition concerning the non-statutory exemption in conflict with the decision of the Court of Appeals in this case. The Petitioners concede that the non-statutory exemption was created by the courts to exempt bona fide collective bargaining agreements between unions and employers, the anticompetitive effects of which are consistent with national labor policy.

The Petitioners assert that *Connell Construction Co. v. Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1975) requires the existence of a collective bargaining relationship in order to permit a party to benefit from the non-statutory labor exemption. The Petitioners then patently mis-state the Court of Appeals

decision by saying that "The Court below totally ignored this crucial requirement". The Court below specifically addressed that issue at Appendix A, p. 11a n. 14:

> Although the alleged "escrow agreement" between Newberg and the district union was not, strictly speaking, a collective bargaining agreement, the cases discussed herein are nevertheless applicable.

The agreement reached was the functional equivalent of a traditional collective bargaining agreement: it involved an employer and the collective bargaining agent of its employees over a subject of mandatory bargaining — wages. The fact that the final wage rate increase was not determined, but depended upon an external factor — the size of the wage increase to be later agreed upon by the Trade Associations and the Union — does not change the nature of the agreement. The cases holding that a collective bargaining agreement should not serve as the sole evidence of a conspiracy do not focus upon the formal requirements of a collective bargaining agreement. Rather, they focus upon the inappropriateness of basing a finding of antitrust conspiracy on an agreement reached as a result of the collective bargaining *process* commanded by the labor laws. A narrower reading of these cases would do substantial damage to the Norris-LaGuardia Act's goal of "full freedom...to negotiate the terms and conditions of...employment," 29 U.S.C. §102, as well as the National Labor Relations Act's goal of reducing "industrial strife and unrest." 29 U.S.C. §151.

The Petitioners spend a great deal of time discussing the parameters of the *Connell* decision, but fail to attempt to overcome the lower court's holding that a complaint must allege conduct operating as a direct restraint upon the business market in order to avoid application of the non-statutory exemption. Restraints operating primarily upon the labor market will fall within the scope of the exemption, regardless of any indirect effects that they may be alleged to have upon commercial competition. An examination of the Petitioners' complaint in the light of

the non-statutory exemption demonstrates the dismissal of the Petitioners' complaint was proper. The complaint alleges no more than an agreement to restrain the labor market. As such, it is exempt from antitrust scrutiny.

In addition, *Connell* is factually different from the case at bar. In *Connell*, the agreement in question did not simply involve wages, rather it sought to directly affect the business market by requiring Connell to subcontract work to only one group of contractors and prohibit the company and other signatory contractors from subcontracting to anyone else. The same "harmonizing" of the two policies is offended as in *U.M.W. v. Pennington*, 381 U.S. 657 (1965) and *Allen Bradley*.

In these two cases, where the labor exemption was not found to apply, there were Agreements that had two common characteristics. First, the Agreements did not deal with wages alone. Second, the Agreements resulted in a direct restraint in the business or product market. Where these two factors are present, it has been determined that an exception to the labor exemption is appropriate to prevent misuse of the exemption by business interests attempting to reduce or eliminate competition.

In the instant case the only Agreement was to place monies in escrow to be used towards paying such wage increase as would be negotiated at some future time by and between the Union and the Trade Associations. There was no Agreement to impose any wage increase or any other condition on anyone. More importantly, even if there were a direct restraint imposed by the agreement, it would not constitute a direct restraint on the business market, but a direct restraint on the labor market.

Therefore, the portion of the Court of Appeals' decision concerning the non-statutory exemption is not in conflict with the cases loosely referred to in the Petitioners' first argument.

2.

The decision below found that the Petitioners failed to allege a shared purpose between the Union and non-labor entities to restrict competition.

The Petitioners attempt to rectify their failure to plead sufficient facts in their complaint by stating "the instant case presents a more complex factual situation." The Court of Appeals properly found that the only anti-competitive purpose alleged was possessed by Newberg. Thus, the only party who might reap an anti-competitive benefit from the agreement did not in fact seek that result, but was forced into such conduct by a non-labor entity lacking anti-competitive intent. An agreement to impose conditions on others is the key element which was missing in the complaint. Absent such an agreement, the labor exemption is not forfeited.

The Petitioners attempt to distinguish *Pennington* is decidedly weak and is wholly unsupported by any cases. A critical element in each of the three cases in which the court found the labor exemption to be inapplicable was the existence of a concerted anti-competitive purpose. The complaint does not allege a concerted purpose shared by the Respondents to disfavor the employers who are not a party to the escrow agreement. The Fifth Circuit has concluded:

> ...in cases falling within the Pennington model, for nonexemption and liability to be found the union must be proved to have had a purpose to injure or eliminate the competitor of a company whose employees it represents. See e.g., Bodine Produce, Inc., v. United Farm Workers, 494 F.2d 531 (9th Cir. 1974). Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., 504 F.2d 896, 903 (5th Cir. 1974).

The Ninth Circuit has concluded that to state "a claim under the Sherman Act, one must allege that an agreement has either an anti-competitive purpose or a substantial anti-competitive

effect." *California State Council of Carpenters, v. Associated General Contractors of California, Inc.*, 648 F.2d 527 (9th Cir. 1981), Cert. granted U.S. 102 S.Ct. 998 (1982).

The Fourth Circuit would impose an even stricter standard in what is referred to as a *"Pennington*-type case." Referring to an agreement between a union and an employer group the Court stated:

> To amount to an antitrust violation the agreement must be rooted in an anti-competitive result, as evidenced by action "ruining" a competitor's business or driving him "out of business." Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the antitrust laws. *Smitty Baker Coal Co., Inc. v. U.M.W.*, 620 F2d 416 (4th Cir. 1980).

The most recent decision in this Court dealing with the labor exemption, shows that the existence of a concerted anticompetitive purpose is of vital importance. Mr. Justice Stewart recently noted that "anti-trust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade." *H. A. Artists and Associates, Inc. v. Actors' Equity Association* 451 U.S. 704, 715 (1981).

CONCLUSION

Because there has been no misapplication of law, no conflict among the Circuits, no issue of substantial importance to the public which this Court should decide and for the other reasons stated in this Brief, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX A.

Section 6 of the Clayton Act, 15 U.S.C. § 17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor...organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.